A

AHMAD SHAZILLY ISMAIL BAKTI

v.

NIK SALMA ZAIDAH HJ WAN MOHD ZAID

B

COURT OF APPEAL, PUTRAJAYA
CLEMENT SKINNER JCA
LIM YEE LAN JCA
ROHANA YUSUF JCA
[CIVIL APPEAL NO: D-02-2146-2011]

C

15 JANUARY 2014

LAND LAW: *Indefeasibility of title and interests - Transfer - Plaintiff as registered proprietor of land - Encumbrances that bind a transferee of land - National Land Code, s. 215(3) - Whether plaintiff's title could be*

D *impeached - Whether defendant a tenant exempt from registration - Statutory Declaration and Syariah Court Order given in favour of defendant - Whether conferred interest in land to defendant which was recognised or registrable under National Land Code - Whether defendant only given an equitable right to occupy land as gratuitous licensee -*

E *Whether defendant a tenant coupled with equity - Whether plaintiff's title to land lawfully and legally obtained - National Land Code, ss. 213(1), 323 & 340*

LAND LAW: *Vacant possession - Claim for - Whether defendant*

F *unlawfully occupying land - Whether defendant given absolute right to build a house and stay on the land - Statutory Declaration and Syariah Court Order given in favour of defendant - Whether conferred interest in land to defendant which was recognised or registrable under National Land Code - Whether defendant only given an equitable right to occupy*

G *land as gratuitous licensee - Whether defendant a tenant coupled with equity - Plaintiff as registered proprietor of land - Whether unimpeachable by virtue of s. 340 National Land Code - Whether plaintiff's title to land lawfully and legally obtained - National Land Code, ss. 213(1), 215(3), 323*

H

LAND LAW: *Ownership - Title to land - Plaintiff as registered proprietor of land - Whether plaintiff's title could be impeached - Whether defendant given absolute right to build a house and stay on land - Statutory Declaration and Syariah Court Order given in favour of*

I *defendant - Whether conferred interest in land to defendant which was recognised or registrable under National Land Code - Whether defendant only given an equitable right to occupy land as gratuitous licensee -*

Whether defendant a tenant coupled with equity - Whether plaintiff's title to land lawfully and legally obtained - National Land Code, ss. 213(1), 215(3), 323 & 340

Vide a sale and purchase agreement ('SPA'), the plaintiff bought a piece of land, Lot 289 ('Lot 289') from its previous registered proprietor, one Nik Ruhiah ('Nik Ruhiah'). Situated on the said land was a two-storey bungalow house built and occupied by the defendant, the adopted sister of Nik Ruhiah, since 1985. The SPA came about in consideration of a friendly loan given by the plaintiff to Nik Ruhiah in the sum of RM1.4 million. However, Nik Ruhiah failed to settle the friendly loan, thus the plaintiff instructed his solicitor to effect the transfer of the said land into his own name. Initially, the plaintiff could not effect the transfer of the land because the defendant had entered a caveat on the register document of title. The plaintiff managed to remove the caveat and discharged the charge and the transfer of the said land was finally effected. Subsequently, the plaintiff received a letter from the defendant informing the plaintiff that the defendant was the 'owner' of the bungalow house on the said land having built it with the permission of Nik Ruhiah based on a statutory declaration ('SD') made by Nik Ruhiah in which she was given an absolute right to build a double-storey house and to stay on the land. The defendant's "ownership" of the bungalow house was further confirmed by a Syariah Court of Appeal Order ("Syariah Court order") made pursuant to the defendant's application to the Syariah High Court to confirm an oral wasiat declared in her favour by her late adopted father. The plaintiff submitted that he was a *bona fide* purchaser for value of the said land and was the current indefeasible proprietor of both the land and the house in accordance with the National Land Code ('NLC'). After the defendant refused to vacate the said land, the plaintiff, through a notice to the defendant, demanded that the defendant deliver up vacant possession of the said land and for the defendant to pay mesne profit at the rate of RM7,000 a month from the date of the expiry of the notice until delivery of vacant possession. Despite the notice, the defendant refused to vacate the said land. The plaintiff filed a suit against the defendant, seeking the same reliefs in his notice. The High Court, in dismissing the plaintiff's claim, held that by virtue of the SD and the Syariah Court order, the defendant was akin to a tenant coupled with an equity. Dissatisfied, the plaintiff appealed. The issues that arose were

A (i) what was the plaintiff's right as the transferee and registered proprietor of Lot 289 to the vacant possession of the said land under the prevailing land law in this country *ie* the NLC; (ii) what was the status of the defendant as an occupant of the bungalow house situated on the said land and claiming "ownership" to such B house based on the SD and the Syariah Court order; (iii) was the defendant a tenant coupled with an equity of the said land; and (iv) was the plaintiff bound by the said tenancy such that he could not ask the defendant to quit the said land unless he paid her a reasonable compensation.

C

Held (allowing appeal)

Per Lim Yee Lan JCA delivering the judgment of the court:

(1) As the *bona fide* purchaser for value of Lot 289 and with his name entered onto the register document of title, the plaintiff D acquired a title that was good against the whole world, including the defendant, as specified in s. 340 of the NLC. The plaintiff's title could not be impeached unless there was actual fraud or misrepresentation to which he was a party or privy, which was not the case here. (paras 44 & 45)

E

(2) It was clear from s. 215(3) of the NLC that encumbrances that bind a transferee of land are those interests as mentioned in s. 215(3)(a) *ie* leases, charges and easements registered on the register document of title and a tenancy exempt from F registration which is endorsed on the register document of title under s. 215(3) of the NLC. The register document of title was conclusive evidence of what was contained therein, what was not registered, entered or endorsed or referred to in the registered document of title as specified in s. 215(3) would not G be binding on a transferee of land and he takes the land free from all other encumbrances. It was not the pleaded case of the defendant that she was a tenant exempt from registration under s. 213(1) of the NLC. As the registered proprietor of Lot 289, the plaintiff was *prima facie* entitled to the possession H of it. (paras 49 & 50)

(3) The SD sworn by Nik Ruhiah in favour of the defendant at best gave her an equitable right to occupy the land as a gratuitous licensee but did not confer any interest in land to I the defendant that was capable of being recognised or

registered under the NLC. Further, the Syariah Court order was not a registrable interest that was capable of being registered under the NLC. Indeed, the caveat entered by the defendant in 2007 on the register document of title of Lot 289 purporting to protect her 'interest' in the house pursuant to the SD and the Syariah Court order was in fact wrongly entered because under s. 323 of the NLC, a caveat can only be entered by a person claiming a registrable interest or title in any alienated land and not otherwise. (paras 59 & 63)

(4) The Syariah Court order also could not confer a "title" to the house in the defendant that was capable of being recognised or registered under the NLC. In light of the definition of "land" read with the legal effect of a transfer of land as provided in s. 215 together with the indefeasibility of that title under s. 340 of the NLC, the Syariah Court order at best conferred on the defendant an equitable or beneficial interest in the said bungalow house which was neither capable of being recognised nor registered under the NLC. (paras 64 & 65)

(5) The defendant could not be described as a tenant coupled with an equity of Lot 289 because (i) there was no landlord-tenant relationship between the defendant and Nik Ruhiah; (ii) the defendant had in her own pleading implied that she was an exclusive gratuitous licensee, and not a tenant, of Nik Ruhiah; (iii) the defendant had never paid a single cent in rental to Nik Ruhiah throughout her occupation of Lot 289 from 1985 to 2008; (iv) the defendant never pleaded that she had expended her own money to construct the bungalow house. The judge had completely misapplied the law to the facts when he held that the defendant was (akin) to a tenant coupled with an equity of the said land. (paras 85 & 86)

(6) The plaintiff had testified that he had no notice of the defendant's alleged right through the SD or the Syariah Court order when he entered into the SPA with Nik Ruhiah in 2005. It was only in 2007 when he wanted to register the transfer that he found out about the caveat of the defendant which was successfully removed by him before the transfer of the said land was effected. Whatever representation or encouragement, if any, to the defendant to construct the said bungalow house, was made by Nik Ruhiah. The defendant's

recourse was therefore against Nik Ruhiah who has to satisfy her equity for any costs or expenses incurred in the construction of the bungalow house, if any. (para 87)

(7) The idea of a gratuitous licensee being able to occupy an alienated land owned by someone else permanently or perpetually, after being given due notice to quit, was repugnant to the concept of indefeasibility of title of a registered proprietor as provided under s. 340 of the NLC and the concept against adverse possession of land by occupation, as explicitly stated in s. 341 of the NLC. Therefore, the plaintiff's title to Lot 289 was lawfully and legally obtained and was unimpeachable by virtue of s. 340 of the NLC. (para 89)

Bahasa Malaysia *Translation Of Headnotes*

Melalui satu perjanjian jual beli ('PJB'), plaintif telah membeli sebidang tanah, Lot 289 ('Lot 289') dari pemilik berdaftar sebelum ini, Nik Ruhiah ('Nik Ruhiah'). Terletak di atas tanah tersebut adalah sebuah rumah banglo dua tingkat yang dibina dan diduduki oleh defendan, adik angkat kepada Nik Ruhiah, sejak 1985. PJB telah muncul sebagai pertimbangan pinjaman persahabatan yang diberikan oleh plaintif kepada Nik Ruhiah, yang berjumlah RM1.4 juta. Walau bagaimanapun, Nik Ruhiah gagal untuk menyelesaikan pinjaman persahabatan itu, dan dengan itu, plaintif telah mengarahkan peguamnya untuk menguatkuasakan pindah milik tanah tersebut kepada namanya. Pada mulanya, plaintif tidak dapat menguatkuasakan pindah milik tanah itu atas sebab defendan telah memasukkan kaveat ke atas dokumen hakmilik berdaftar. Plaintif telah berjaya mengetepikan kaveat itu dan melepaskan caj, dan pindah milik tanah tersebut akhirnya telah dikuatkuasakan. Kemudiannya, plaintif menerima surat daripada defendan yang telah memaklumkan kepada plaintif bahawa defendan adalah 'pemilik' rumah banglo di atas tanah tersebut dan telah membinanya dengan kebenaran Nik Ruhiah berdasarkan akuan statutori ('AS') yang dibuat oleh Nik Ruhiah di mana defendan telah diberikan hak mutlak untuk membina sebuah rumah dua tingkat dan untuk menduduki tanah tersebut. "Pemilikan" defendan ke atas rumah banglo itu juga telah disahkan oleh perintah Mahkamah Rayuan Syariah ("perintah Mahkamah Syariah") yang dibuat menurut permohonan defendan kepada Mahkamah Tinggi Syariah untuk mengesahkan wasiat lisan yang telah diisytiharkan memihak kepadanya oleh bapa angkatnya yang telahpun meninggal dunia.

Plaintif menghujahkan bahawa dia adalah pembeli *bona fide* untuk nilai tanah tersebut dan adalah pemilik yang tidak boleh disangkal kedua-dua tanah dan rumah menurut Kanun Tanah Negara ('KTN'). Selepas defendan enggan mengosongkan tanah tersebut, plaintif melalui notis kepada defendan telah membuat tuntutan untuk defendan menyerahkan milikan kosong tanah tersebut dan untuk defendan membayar mesne profit pada kadar RM7,000 sebulan dari tarikh habis tempoh sehingga penyerahan milikan kosong. Walaupun notis telah diberikan, defendan masih enggan mengosongkan tanah tersebut. Plaintif telah memfailkan guaman terhadap defendan, dan menuntut relif-relif yang sama dalam notis yang telah diberikan. Mahkamah Tinggi, dalam menolak tuntutan plaintif, memutuskan bahawa menurut kuasa AS dan perintah Mahkamah Syariah, defendan seakan-akan penyewa yang mempunyai ekuiti. Tidak puas hati, plaintif merayu. Isu-isu yang timbul adalah (i) apakah hak perayu sebagai penerima pindahan dan pemilik berdaftar Lot 289 kepada milikan kosong tanah tersebut di bawah undang-undang tanah yang wujud dalam negara ini iaitu KTN; (ii) apakah status defendan sebagai penduduk rumah banglo yang terletak atas tanah tersebut dan menuntut "pemilikan" ke atas rumah itu berdasarkan AS dan perintah Mahkamah Syariah; (iii) adakah defendan seorang penyewa yang mempunyai ekuiti ke atas tanah tersebut; (iv) sama ada plaintif terikat oleh penyewaan tersebut dan dengan itu dia tidak boleh menyuruh defendan menarik diri dari tanah tersebut melainkan dia membayarnya satu pampasan berpatutan.

Diputuskan (membenarkan rayuan)
Oleh Lim Yee Lan HMR menyampaikan penghakiman mahkamah:

(1) Sebagai pembeli *bona fide* bagi nilai Lot 289 dan dengan namanya dimasukkan ke atas dokumen hakmilik berdaftar, plaintif telah memperoleh hakmilik yang baik terhadap seluruh dunia, termasuk defendan, seperti yang telah dinyatakan dalam s. 340 KTN. Hakmilik plaintif tidak boleh dicabar kecuali jika terdapat penipuan besar atau misrepresentasi yang melibatkan plaintif sebagai satu pihak atau diambil bahagian oleh plaintif, tetapi itu bukanlah kes di sini.

(2) Adalah jelas daripada s. 215(3) KTN bahawa sekatan yang mengikat penerima pindahan sebidang tanah adalah kepentingan-kepentingan yang telah disebut dalam s. 215(3)(a) iaitu sewaan, caj dan easemen yang telah didaftarkan atas

dokumen hakmilik berdaftar dan penyewaan yang dikecualikan pendaftaran yang diendorskan pada dokumen hakmilik berdaftar di bawah s. 215(3) KTN. Dokumen hakmilik berdaftar adalah keterangan muktamad daripada apa yang terkandung di dalamnya, apa yang tidak didaftar, dimasukkan atau diendorskan atau dirujuk dalam dokumen hakmilik berdaftar seperti yang dinyatakan di dalam s. 215(3) KTN tidak akan terikat ke atas penerima pindah milik tanah itu dan dia akan mengambil tanah itu bebas daripada segala sekatan lain. Ia bukanlah kes yang diplidkan oleh defendan bahawa dia adalah penyewa yang dikecualikan daripada pendaftaran di bawah s. 213(1) KTN. Sebagai pemilik berdaftar Lot 289, plaintif adalah *prima facie* berhak kepada milikan tanah itu.

(3) AS yang diangkat sumpah oleh Nik Ruhiah yang memihak kepada defendan sekurang-kurangnya memberikan defendan hak saksama untuk menduduki tanah itu sebagai pemegang lesen sukarela tetapi tidak memberikan apa-apa kepentingan mengenai tanah kepada defendan yang mampu diiktiraf atau didaftarkan di bawah KTN. Selanjutnya, perintah Mahkamah Syariah bukan kepentingan yang boleh didaftarkan di bawah KTN. Sesungguhnya, kaveat yang telah dimasukkan oleh defendan pada tahun 2007 pada dokumen hakmilik Lot 289 yang bertujuan untuk melindungi "kepentingan" defendan dalam rumah di bawah AS dan perintah Mahkamah Syariah adalah dimasukkan secara salah kerana menurut s. 323 KTN, kaveat hanya boleh dimasukkan oleh seseorang yang menuntut kepentingan atau hakmilik yang boleh didaftarkan di bawah KTN dan bukan sebaliknya.

(4) Perintah Mahkamah Syariah juga tidak boleh memberikan "hakmilik" rumah itu kepada defendan yang boleh diisytiharkan atau didaftarkan di bawah KTN. Berdasarkan definisi "tanah" yang dibaca dengan kesan undang-undang pemindahan seperti yang disediakan dalam s. 215 bersama-sama dengan hakmilik yang tidak boleh disangkal itu di bawah s. 340 KTN, perintah Mahkamah Syariah hanya memberikan kepentingan saksama dan manfaat pada rumah banglo tersebut kepada defendan yang tidak boleh diisytiharkan atau didaftarkan di bawah KTN.

(5) Defendan tidak boleh dianggap sebagai penyewa yang mempunyai ekuiti bagi Lot 289 kerana (i) tiada perhubungan tuan tanah-penyewa di antara defendan dan Nik Ruhiah; (ii) defendan dalam plidingnya secara tersirat menyatakan

bahawa dia adalah pemegang lesen sukarela yang eksklusif, dan bukan penyewa pada Nik Ruhiah; (iii) defendan tidak membayar satu sen pun bagi sewaan kepada Nik Ruhiah semasa dia menduduki Lot 289 dari 1985 hingga 2008; (iv) defendan tidak memplidkan bahawa dia telah menggunakan duitnya sendiri untuk membina rumah banglo itu. Hakim telah menyalahgunakan undang-undang kepada fakta yang sedia ada apabila dia memutuskan bahawa defendan adalah seakan-akan penyewa yang mempunyai ekuiti tanah tersebut.

(6) Plaintif menyatakan bahawa dia tidak mempunyai notis berkenaan hak defendan yang didakwa melalui AS atau perintah Mahkamah Syariah apabila dia memasuki PJB dengan Nik Ruhiah pada tahun 2005. Hanya pada tahun 2007 apabila plaintif ingin mendaftarkan tanah dia dimaklumkan bahawa terdapat kaveat defendan yang telah berjaya diketepikan olehnya sebelum pemindahan tanah tersebut telah dilakukan. Walau apapun representasi atau rangsangan, jika ada, kepada defendan untuk membina rumah banglo itu, adalah dibuat oleh Nik Ruhiah. Rekursa defendan oleh itu adalah terhadap Nik Ruhiah yang harus memuaskan ekuiti bagi apa-apa kos atau perbelanjaan yang dikenakan dalam pembinaan rumah banglo itu, jika ada.

(7) Konsep bahawa pemegang lesen sukarela boleh menduduki tanah yang dimiliki oleh pihak lain, secara tetap atau selama-lamanya, selepas diberikan notis untuk meninggalkan tanah itu, adalah bertentangan dengan konsep hakmilik yang tidak boleh disangkal seorang pemilik berdaftar seperti yang diperuntukkan di bawah s. 340 KTN dan konsep terhadap pemilikan bertentangan tanah melalui pendudukan, seperti yang telah dinyatakan dengan jelas dalam s. 341 KTN. Oleh itu, hakmilik plaintif ke atas Lot 289 adalah diperolehi mengikut undang-undang dan tidak boleh dicabar menurut s. 340 KTN.

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1999] 6 CLJ 487 HC ***(refd)***

Ambank (M) Bhd v. Luqman Kamil Mohammed Don [2011] 6 CLJ 277 CA ***(refd)***

Assets Co v. Mere Roihi [1905] AC 176 PC ***(refd)***

Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Mengenali Diri Sebagai 'Ponga' & Ors [1999] 3 CLJ 257 HC ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***

Chuan Seng Sdn Bhd v. Ooi Boon Lai & Ors [1993] 3 CLJ 153 HC ***(refd)***
Dr Ti Teow Siew & Ors v. Pendaftar Geran-Geran Tanah Negeri Selangor [1981] CLJ 134A; [1981] CLJ (Rep) 142 HC ***(refd)***
Frazel v. Walker [1967] AC 569 ***(refd)***
Gibbs v. Messer [1891] AC 248 ***(refd)***
Inwards v. Baker [1965] 1 All ER 446 ***(refd)***
Koh Siak Poo v. Sayang Plantation Bhd [2002] 1 CLJ 501 CA ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syed Ahmed MM Gouse Mohamed [2007] 1 CLJ 547 CA ***(refd)***
Mok Deng Chee v. Yap See Hoi & Ors [1981] CLJ 124B; [1981] CLJ (Rep) 69 FC ***(refd)***
Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 LNS 96 FC ***(refd)***
Ong Tin v. The Seremban Motor Garage [1917] 1 FMSLR 308 ***(refd)***
Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 1 LNS 135 PC ***(refd)***
Sen Loon Heng lwn. Zabon & 3 Kes Lagi [1996] 1 CLJ 775 HC ***(refd)***
Taufik a/l Hamid & Anor v. Bukit Makmur Sdn Bhd [1995] 1 BLJ 68 HC ***(refd)***
Teh Bee v. K Maruthamuthu [1977] 1 LNS 134 FC ***(refd)***
Teo Bee Ann & Anor v. Goh Say Dock & Anor [2010] 9 CLJ 238 HC ***(refd)***
Toh Kheng Heng & Anor v. Ahmad Fauzi Mohd Taufek [1994] 1 CLJ 547 HC ***(refd)***
United Malayan Banking Corporation Bhd v. Pemungut Hasil Tanah, Kota Tinggi & Another Case [1984] 2 CLJ 146; [1984] 1 CLJ (Rep) 51 PC ***(refd)***
Waimiha Sawmilling Co v. Waione Timber Co [1926] AC 101 PC ***(refd)***
Yeap Yok Tee v. Lee Boon Bee [1972] 1 LNS 176 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3(1)
Kelantan Administration of Syariah Court Enactment 1982, s. 9(2)(vii)
National Land Code, ss. 5, 104, 120, 213(1), (3), 215(3)(a), (b), (c), (d), 316, 320(1)(b), 323, 340, 341
Rules of the High Court 1980, O. 89

For the plaintiff - Ariyani Mohd Amin; M/s Ariyani & Marhaini
For the respondent - Nasrul Mohamed; M/s C Jegathesan

Reported by Suhainah Wahiduddin

JUDGMENT

Lim Yee Lan JCA:

[1] This appeal arose from the decision of the High Court at Kota Bharu dated 1 August 2011 in which the learned judge dismissed the appellant's claim against the respondent for vacant

possession and mesne profit in respect of a piece of land known as Lot No 289 Seksyen 27 Bandar Kota Bharu Kelantan ("Lot 289" or "the said land").

[2] We had earlier by a unanimous decision allowed the appellant's appeal and set aside the order of the High Court Judge. We now give reasons for our decision. For ease of reference we will refer to the parties as they were in the High Court.

The Factual Background

[3] The factual background is briefly this. *Vide* a sale and purchase agreement dated 12 December 2005 ("SPA") (exh. P1) the plaintiff bought Lot 289 from its previous registered proprietor, Nik Ruhiah Zaidah bt Hj. Wan Mohd Zaid ("Nik Ruhiah"). Clause 1.1 of the SPA provides that the said land is sold free from all legal and equitable encumbrances with vacant possession. Clause 7.1 provides that the vendor shall deliver access/possession within two calendar days from the receipt of the full balance sum.

[4] Situated on the said land is a two-storey bungalow house built and occupied by the defendant since 1985. The defendant is the adopted sister of Nik Ruhiah.

[5] The said land was charged to Bank Bumiputra Commerce (exh. P2) by Nik Ruhiah since 1979.

[6] The SPA came about in consideration of a friendly loan given by the plaintiff to Nik Ruhiah in the sum of RM1.4 million to enable Nik Ruhiah, who was the wife of the plaintiff's friend, to redeem the said land as the chargee bank had commenced foreclosure proceedings against Nik Ruhiah.

[7] Nik Ruhiah was supposed to have repaid the friendly loan within two years. However, two years after the friendly loan and Nik Ruhiah still failed to settle the friendly loan, the plaintiff instructed his solicitor to effect the transfer of the said land into his own name.

[8] On 22 April 2006, the plaintiff instructed his solicitor, Tetuan Amir & Partners, to make an official search of the title of the said land at the relevant land office and it was confirmed that the only encumbrance found on the registered document of title was a charge registered in favour of Bank Bumiputra Commerce.

[9] Initially, the plaintiff could not effect the transfer of the land because the defendant had entered a caveat on the register document of title on 12 February 2007. The plaintiff managed to remove the caveat and discharged the charge and the transfer of the said land was finally effected on 31 January 2008.

[10] On 15 February 2008 the plaintiff instructed his then solicitor, Messrs Amir, Lim & Partners, to issue a letter to the defendant to contact the plaintiff's solicitor regarding the rental of the said land if she wished to continue to stay on the said land.

[11] On 6 March 2008, the plaintiff's solicitor received from the defendant's solicitor a letter informing the plaintiff's solicitor that the defendant is the "owner" of the bungalow house on the said land having built it with the permission of Nik Ruhiah based on a statutory declaration dated 10 March 1085 ("SD") made by Nik Ruhiah in which she was given an absolute right to build a double-storey house and to stay on the said land. The defendant's "ownership" of the bungalow house was further confirmed by a Syariah Court of Appeal order dated 11 April 2002 ("Syariah Court Order") made pursuant to the defendant's application to the Syariah High Court to confirm an oral wasiat declared in her favour by her late adopted father.

[12] *Vide* a letter of his solicitor dated 7 March 2008, the plaintiff informed the defendant that he had no knowledge whatsoever of the defendant's alleged right to the house at the time he acquired the said land. The plaintiff also stated in the said letter that he is a *bona fide* purchaser for value of the said land and is the current indefeasible proprietor of both the land and the house in accordance with the National Land Code.

[13] After the defendant refused to vacate the said land, the plaintiff through a notice dated 14 May 2008 of his solicitor, Messrs Yusof Nor & Co, addressed to both the defendant's solicitor and the defendant, demanded that:

(a) the defendant to vacate the house and deliver up vacant possession of the said land at the latest by 1 July 2008; and

(b) the defendant to pay to the plaintiff mesne profit at the rate of RM7,000 per month from the date of the expiry of the notice on 1 July 2008 until delivery of vacant possession. This was because at the date of the notice, the rate of rental for similar premises in the said area was around RM3,500 per month.

[14] Despite the notice, the defendant refused to vacate the said house and the said land. On 26 August 2008, the plaintiff filed the present suit at the Kota Bharu High Court seeking the same reliefs as in his notice dated 14 May 2008, together with interest and costs.

[15] The defendant denies the plaintiff's claim and in her statement of defence pleads that by virtue of the absolute right (kebenaran secara mutlak) given to her by Nik Ruhiah through the SD to build the said double-storey bungalow house and the Syariah Court Order declaring her as the owner of the said house, she is entitled to remain staying in the house.

[16] Nik Ruhiah was aware of the Syariah Court Order as she and her adopted mother were named as respondents in the Syariah Court Order.

[17] The defendant also pleads that the plaintiff's recourse is against Nik Ruhiah who had misrepresented to him regarding the actual situation regarding Lot 289.

The High Court Decision

[18] At the conclusion of the trial, after hearing the plaintiff (SP1) and his witness, Hj Rahim bin Mohamad, an Assistant Registrar of Titles, Kelantan (SP2) and the defendant herself (SD1), the learned High Court Judge dismissed the plaintiff's claim with costs.

[19] The sole basis of the learned judge's decision for dismissing the plaintiff's claim was that by virtue of the SD and the Syariah Court Order the defendant was akin (seakan-akan) to a tenant coupled with an equity.

[20] According to the learned judge, the defendant comes within the definition of "a licensee" in *Mozley & Whiteley's Law Dictionary*, second edition as "a person who enters premises with the permission of the occupier granted either gratuitously or for consideration" and "a tenant coupled with equity" as stated in the Federal Court's decision in the case of *Mok Deng Chee v. Yap See Hoi & Ors* [1981] CLJ 124B; [1981] CLJ (Rep) 69; [1981] 2 MLJ 321 and the English case of *Inwards v. Baker* [1965] 1 All ER 446, being a person "who had expended money on the land under an expectation created or encouraged by the landlord that she will be able to remain there".

[21] The learned judge also opined that by virtue of s. 215(3)(c) of the National Land Code (NLC) and the case of *Yeap Yok Tee v. Lee Boon Bee* [1972] 1 LNS 176; [1973] 1 MLJ 3, the plaintiff as the transferee of the said land not only takes over the assets but also liabilities as well as all "incumbrances" (should be encumbrances) existing on the said land (menurut undang-undang suatu pemindahan milik tanah bukan saja melibatkan asset tapi juga liability dan 'incumbrance' yang terdapat pada tanah tersebut).

[22] The learned judge held that the "said double-storey bungalow house" and "the defendant" constituted "incumbrances" existing on the said land at the time the plaintiff entered into the SPA to purchase the said land. The plaintiff therefore took the transfer of the said land subject to the defendant's right to occupy the said house.

[23] The learned judge went on to hold that as the defendant had expended a big sum of money to construct the double-storey bungalow house on the encouragement and permission of Nik Ruhiah, the plaintiff as the new registered proprietor cannot require the defendant to quit the said land unless he pays to the defendant a reasonable compensation.

[24] The learned judge further held that in this case the plaintiff's remedy is against Nik Ruhiah for misrepresenting and or concealing the true facts from him on the status of the said house.

[25] Based on the foregoing premises, the learned judge dismissed the plaintiff's claim for vacant possession of the said land and mesne profit against the defendant with costs.

[26] Dissatisfied with the decision of the learned High Court Judge the plaintiff appeals to this court.

This Appeal

[27] Before us the plaintiff raised two main grounds of appeal as follows:

(a) the learned judge erred in law and in fact when in arriving at his decision he had completely disregarded the plaintiff's right as a transferee and registered proprietor of the said land to the vacant possession of his own land under the prevailing land law in this country; and

(b) the learned judge erred in law and in fact in holding that the defendant was a tenant coupled with equity when it was not the defendant's pleaded case and there was no evidence before the court to support such a finding.

[28] In regard to the first ground, learned counsel for the plaintiff submitted that it is trite law that upon the registration of the transfer of the said land on 31 January 2008, the plaintiff acquired an indefeasible title to Lot 289 that is good against the whole world, including the defendant, as is clearly provided in s. 340 of the NLC (see cases of *Frazer v. Walker* [1967] 1 AC 569; *Gibbs v. Messer* [1891] AC 248; *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224; *Teh Bee v. K Maruthamuthu* [1977] 1 LNS 134; [1977] 2 MLJ 7; *Dr Ti Teow Siew & Ors v. Pendaftar Geran-Geran Tanah Negeri Selangor* [1981] CLJ 134A; [1981] CLJ (Rep) 142; [1982] 1 MLJ 38).

[29] As the registered proprietor of the land, the plaintiff is entitled to the full ownership, possession and enjoyment of his own land, subject only to such existing encumbrances as are registered, entered and endorsed on the register document of title, as provided in s. 215(3) of the NLC.

[30] It is clear that the defendant's alleged right to the said bungalow house on the said land is not a right or interest which is capable of being registered, endorsed or entered under s. 215(3)(a), (b) or (d) of the NLC, in order to bind the plaintiff as the transferee and new registered proprietor of the said land.

[31] Neither did the "bungalow house" nor the "the Defendant" constitute "encumbrances" under s. 215(3)(c) of the NLC as erroneously held by the learned judge. This is because s. 215(3)(c) refers to a "restriction in interest" and or a "condition" endorsed on the document of title at the time the State Authority alienates State land to a person.

[32] As regards to the Syariah Court Order, it was submitted that it is similarly not binding on the plaintiff. The defendant had obtained the order in 2002 but did not do anything to protect her right. She only entered the caveat on 21 February 2007. The caveat was successfully removed before the transfer of the title to the plaintiff on 31 January 2008. Hence at the time of the transfer, there was no encumbrance on the title of the said land

to prevent its transfer to the plaintiff. If the defendant had a right to the house as alleged, she ought to have applied for a court order to protect that right after obtaining the Syariah Court Order on 11 April 2002. Instead she did nothing and sat on her right from 2002 to 2007.

[33] With regard to the second ground of appeal, it was submitted that the learned judge erred in law and in fact when he held that defendant is akin (adalah seakan-akan) to a tenant coupled with an equity on the said land.

[34] It was submitted that neither the pleading of the defendant nor the evidence led in court by her established the defendant as a tenant coupled with an equity. In doing so the learned judge had decided on a case which was never pleaded by the defendant.

[35] In her statement of defence all that the defendant had pleaded was that while the plaintiff is the registered owner of the said land she is the "owner" of the bungalow house by virtue of the SD and the Syariah Court Order and she cannot be asked to vacate the said house and the said land. The defendant never pleaded that she was a tenant coupled with an equity. She did not seek for compensation from the plaintiff as a condition for her to quit the land. Neither did she bring in Nik Ruhiah as a co-defendant to claim for compensation from her. The defendant therefore stands or falls by her pleading.

[36] It was submitted that it is trite law that parties are bound by their pleading and it is not for the court to make out a case for a party when it is not the pleaded case of that party in the first place (see *Ambank (M) Bhd v. Luqman Kamil Mohammed Don* [2011] 6 CLJ 277; and *Koh Siak Poo v. Sayang Plantation Bhd* [2002] 1 CLJ 501; [2002] 1 MLJ 65).

[37] It was submitted that in any case the evidence adduced by the defendant during the trial did not establish her to be a tenant coupled with an equity. This is because a "tenant coupled with equity" is one who had "been induced or encouraged or given the expectation by the landlord that he or she could remain on the land if he or she continues to pay the rent which prompted the tenant to expend money to improve the land". Here the defendant had admitted in cross-examination that the money for the construction of the house did not come from her but her late

adopted father (see p. 15 of RR). Hence the finding of the learned judge that the defendant "telah membelanjakan wang yang begitu besar untuk membina rumah" was an erroneous finding that had no basis whatsoever.

[38] In this case the learned judge can be said to have committed a jurisdictional error and his decision is bad in law and liable to be set aside by the appellate court.

[39] With regard to the issue raised by learned counsel for the defendant in his submission that the plaintiff's title to the said land is illegally obtained, it was submitted that this issue is completely baseless and should be dismissed outright, for the following reasons:

(a) The issue of the illegality of the plaintiff's title of the said land was never pleaded by the defendant and so was never an issue to be tried in this case;

(b) No finding was made by the judge on this issue in his grounds of judgment;

(c) The issue of illegality was raised only during submission at the close of the trial by learned counsel on the ground that the SPA was entered into while foreclosure proceedings on the said land had been commenced by the chargee bank in the High Court and that before the transfer of the land the plaintiff was already aware of the caveat entered on the document of title of Lot 289 by the defendant in 2007;

(d) The indefeasibility of the plaintiff's title can only be impeached if there was fraud or misrepresentation to which the plaintiff was a party or privy. In this case neither fraud nor misrepresentation was pleaded by the defendant nor was there any evidence of fraud or misrepresentation having been perpetrated by the plaintiff (see *Assets Co v. Mere Roihi* [1905] AC 176 (PC); *Waimiha Sawmilling Co v. Waione Timber Co* [1926] AC 101 (PC) and *Ong Tin v. The Seremban Motor Garage* [1917] 1 FMSLR 308);

(e) Here the issue of illegality was raised in the context of antecedent acts of either party to the SPA transaction which cannot in any case impugn the title of the plaintiff under the Torrens system of land registration as practiced under the NLC;

(f) For example, in *Frazer v. Walker*, Lord Wilberforce held:

> ... Even if non-compliance with the Act's requirements may involve the possibility of cancellation or correction of the entry ... registration once effected must attract the consequences which attaches to registration whether that was regular or otherwise...it is in fact the registration and not its antecedents which vests and divests title.

(g) Here the plaintiff's unchallenged evidence (which was in fact accepted by the learned judge) was that he was not aware of the SD nor the Syariah Court Order at the time he entered into the SPA. Nevertheless, even if the plaintiff had knowledge of the defendant's right to the bungalow house on the said land, it would still not affect the plaintiff's title to the said land;

(h) This can be seen in *Waimiha Sawmilling Co* in which the Privy Council held:

> ... a registered proprietor who took a transfer with actual knowledge of an existing adverse claim (in fact of a pending litigation based on the claim) against his transferor, acquired an indefeasible title as his mere knowledge of the existence of the adverse claim did not amount to fraud.

In that case, Lord Buckmaster further held:

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered, and thus fraudulently keeping the register clear.

(i) The same principle was applied in *Ong Tin v. The Seremban Motor Garage* in which the Court of Appeal held that mere knowledge of an adverse claim did not amount to fraud. The plaintiff there had purchased a piece of land knowing that his vendor had previously agreed to grant a lease to the defendant who had since entered into possession of the land. Having obtained the title to the land by registration of transfer to him, the plaintiff brought this action to eject the defendant. The Court of Appeal, reversing the decision of the lower court, held that the plaintiff's notice of the unregistered lease alone could not be imputed as there was no fraud on his part and he had acquired an indefeasible title which would sustain his action for ejectment.

[40] Based on the foregoing submissions, the plaintiff urged this court to allow the plaintiff's appeal and grant the orders as prayed for in his statement of claim with costs.

Our Decision

[41] After perusing the record of appeal and after hearing the submission of learned counsel for both parties, we had allowed the appeal on the ground that there were appealable errors both on the law and the facts on the part of the learned High Court Judge which warrant our intervention in his findings. We had accordingly set aside the decision of the High Court and granted judgment for the plaintiff in terms of prayer 11(a) of his statement of claim. We also awarded costs of RM30,000 to the plaintiff and ordered the deposit to be refunded. We now give the reasons for our decision.

[42] In our view, this appeal can be effectively disposed of by considering the issues under the following heads:

(i) What is the plaintiff's right as the transferee and registered proprietor of Lot 289 to the vacant possession of the said land under the prevailing land law in this country ie, the NLC?

(ii) What is the status of the defendant as an occupant of the bungalow house situated on the said land and claiming "ownership" to such house based on the SD and the Syariah Court Order?

(iii) Is the defendant a tenant coupled with an equity of the said land as was found by the learned judge?

(iv) If the answer to question (iii) is in the affirmative, is the plaintiff nevertheless bound by the said tenancy such that he cannot ask the defendant to quit the said land unless he pays her a reasonable compensation as decided by the High Court Judge?

First Issue: Plaintiff's Right As The Registered Proprietor To Vacant Possession Of The Said Land

[43] We shall first address the issue regarding the plaintiff's right as the new registered proprietor of Lot 289 to vacant possession of his own land *vis-à-vis* the defendant as the occupant of the said land.

[44] In this regard, we agree entirely with the submission of learned counsel, and the decided case law authorities cited in his submission, that as the *bona fide* purchaser for value of Lot 289 and who got his own name entered onto the register document of title, the plaintiff acquired a title that is good against the whole world, including the defendant, as specified in s. 340 of the NLC.

[45] As rightly pointed out by learned counsel, under s. 340 of the NLC, the plaintiff's title cannot be impeached unless there is actual fraud or misrepresentation to which he was a party or privy, which is not the case here.

[46] In *Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Mengenali Diri Sebagai 'Ponga' & Ors* [1999] 3 CLJ 257 Abdul Malik Ishak J (as he then was) held:

> The property has since been transferred and registered in the name of the plaintiff. In accepting the transfer of the property, the plaintiff holds it subject to "other registered interests" as envisaged in s. 215(3)(a) of the NLC. Once the plaintiff became registered as the proprietor of the property, the title became indefeasible under s. 340 of the NLC and the plaintiff has a title which was free of all adverse claims or encumbrances not noted on the register (*Punca Klasik Sdn Bhd v. Liza James & Ors* (*supra*)).
>
> Lord Diplock in *T. Damodaran v. Choe Kuan Hin* [1979] 2 MLJ 2676 PC held that the only exceptions to the principle of indefeasibility would be in situations where there were fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority.
>
> In my judgment, none of these exceptions apply to the present case. The court in *Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & 54 Ors* [1994] 2 AMR 1296 said at p. 1304:
>
> > Under our Torrens System the register is everything. Upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land (s. 340(1) of the National Land Code), that is, a title or an interest which is free of all adverse claims or encumbrances not noted on the register. I might as well mention that registration under the National Land Code is effected when a prescribed memorial of the dealing is made on the register document of title under the hand and seal of the registering authority (*Mohammad bin Buyong v. Pemungut Hasil Tanah, Gombak & Ors* [1982] 2 MLJ 53).

and clearly the plaintiff here was entitled to hold the property free from all adverse claims or encumbrances not stated on the register document of title.

[47] Under the NLC, in addition to acquiring an indefeasible title to the said land, the plaintiff's ownership of the said land also carries with it the incidents, rights and obligations as specified in s. 215 of the NLC, which reads as follows:

(1) ...

(2) The title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered interests then enjoyed with the land.

(3) The transferee of any alienated land shall hold the same subject to:

(a) any lease, charge or other registered interest subsisting in respect thereof at the time the transfer is registered;

(b) subject to sub-section (3) of section 213, any tenancy exempt from registration granted by the transferor or any predecessor in title;

(c) all conditions and restrictions in interest then applicable thereto; and

(d) all other matters then appearing on, or referred to in, the register document of title.

[48] It is clear from s. 215(3) that encumbrances that bind a transferee of land are those interests as mentioned in s. 215(3)(a) ie, leases, charges, and easements registered on the register document of title and a tenancy exempt from registration which is endorsed on the register document of title under s. 215(3)(b) of the NLC.

[49] Since as stated in the aforementioned decided cases, the register document of title is conclusive evidence of what is contained therein, what is not registered, entered or endorsed or referred to in the register document of title as specified in s. 215(3) will not be binding on a transferee of land and he takes the land free from all other encumbrances.

[50] In this regard, it must be noted that it was not the pleaded case of the defendant that she was a tenant exempt from registration under s. 213(1) of the NLC. A tenancy exempt from registration binds the plaintiff under s. 215(3)(b) as a transferee of Lot 289. In any case it applies only if such tenancy was endorsed on the register document of title to Lot 289 pursuant to s. 316 before the date of the transfer. This is clearly stated in s. 215(3)(b) read with s. 213(3). We must also clarify that neither the "bungalow house" on the said land nor the "defendant" herself constitutes an "encumbrance" under s. 215(3)(c) of the NLC, as was erroneously held by the learned judge. This is because s. 215(3)(c) is concerned with a "restriction in interest" and or a "condition" imposed by and endorsed on the document of title at the time of the alienation of State land by the State Authority. A "restriction in interest" as defined in s. 5 of the NLC is "any restriction imposed by the State Authority on any of the powers of dealing under Division IV and like limitation imposed under the previous land law", while a "condition" relates to the use of any alienated land imposed by State Authority and endorsed on the title of said land at the time of the alienation of State land, under s. 120 of the NLC. It is not in doubt that by virtue of s. 104 every condition and restriction in interest shall run with the land to which it relates and shall bind the proprietor thereof for the time being and every person or body claiming in the land, howsoever derived. Hence the learned High Court Judge misconstrued the law when he held that the house on Lot 289 and the defendant herself constitute encumbrances under s. 215(3)(c) of the NLC.

[51] From the foregoing discussion on the provisions of the NLC as interpreted by case law, it is clear that as the registered proprietor of Lot 289 the plaintiff is *prima facie* entitled to the possession of it and the defendant who is claiming a right of occupation against the plaintiff bears the burden of proving such a right on a balance of probabilities.

Second Issue: Defendant's Position In Law As Occupant Of The Said Land Pursuant To The SD And The Syariah Court Order

[52] This brings us to the issue of what exactly is the position of the defendant as the occupant of Lot 289 pursuant to the SD and the Syariah Court Order?

[53] We shall first deal with the SD to determine the nature of the right granted to the defendant under it. The SD it reads as follows:

> Nik Ruhiah Zaidah bt Hj. Wan Mohd. Zaid
> 5640E, Jalan Sri Cemerlang
> Kota Baharu
> Kelantan.
>
> Tarikh: 10hb. March, 1985.
>
> Kepada Sesiapa Yang Berkenaan
>
> Tuan,
>
> Per: Kebenaran Mendirikan Rumah Bertingkat
> Di Lot 289, Mukim Seksyen 27, Bandar,
> Daerah Kota Baharu
>
> Saya Nik Ruhiah Zaidah bt Haji Wan Mohd. Zaid, Kad Pengenalan No. 4321772 yang tinggal di 5640E, Jalan Sri Cemerlang dengan suci hati memberi kebenaran kepada Nik Salma Zaidah bt Haji Wan Mohd. Zaid Kad Pengenalan No. A 0125096 adik saya untuk mendirikan rumah bertingkat di Lot 289, Mukim Seksyen 27 Bandar, Daerah Kota Baharu kepunyaan saya tanpa dikenakan apa-apa bayaran.
>
> Sekian,
>
> Yang benar,
>
> t.t.
> (Nik Ruhiah Zaidah bt. Hj. Wan Mohd. Zaid)
> KP. 4321771

[54] No explanation was given of the circumstances under which the SD was granted. Looking at the tenor of the SD, it is our view that at best it could be said to have granted to the defendant a right to build a double-storey house on the said land and to occupy it without having to make any payment to Nik Ruhiah. To our minds, the effect of the SD in law is that it makes the defendant a gratuitous exclusive licensee of the said land.

[55] What then is the status of an exclusive gratuitous licensee occupying land belonging to another under the prevailing provisions of the NLC? Did it create any interest that is capable of being registered under the NLC and what is its effect on the title of the registered proprietor of the land in question as well as a subsequent purchaser who takes the land with or without notice of the licence?

[56] In this regard, we would like to quote from the following passages of the judgment of Ahmadi J in the case of *Teo Bee Ann & Anor v. Goh Say Dock & Anor* [2010] 9 CLJ 238 which read as follows:

> [28] It is trite that a licence does not create any interest and is not an interest in land. It is only a personal obligation and would not be enforceable against third parties. It is equally worthy to note that the said agreement is not registered against the title deed of the said land in the relevant Land Office. As such whatever licence the first defendant is claiming over the said portion of the land is void and unenforceable against the subsequent registered landowners of the said land whose title is indefeasible save for those cases where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority.
>
> …
>
> [31] Finally, in my view the defendants' claim or contention is totally alien in our Torrens System whereby the register is everything. Nothing can be registered the registration of which is not expressly authorized by statute and if it is capable of being registered, the registration gives an indefeasible title to the land or interest in the absence of fraud – see *T. Damodaran v. Choe Kuan Him* [1979] 1 LNS 107. Such claim by the defendants has no legal basis at all. The National Land Code which governs the land law in our country makes no mention of interest in land under the guise of irrevocable right in the land or beneficial ownership with an irrevocable right to occupy the land in perpetuity. The only interest in land capable of recognition and registration are leases, charges and easements. The defendants' claim did not come under either of these interests. Neither were the defendants the registered owners of the said portion of land whose title would then be indefeasible against the rest of the world. The defendants' claim/contention truly is misconceived, beyond the scope of our law.
>
> Equally it has no basis in equity either as the equity has been satisfied long ago or extinguished. More importantly the defendants did not come to court with clean hands.

[57] We fully subscribe to the view of the learned judge in *Teo Bee Ann* as stating the correct proposition of law on the status of a gratuitous licensee under the NLC.

[58] We would also cite the case of *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 1 LNS 135; [1976] 2 MLJ 44 in which the Privy Council held, *inter alia*, that interest which the

Registrar of Titles was empowered to protect under s. 320(1)(b) of the NLC were confined to interests in the land that were recognised by the National Land Code as being either registrable or otherwise entitled to protection. An unsecured creditor (in that case) of the proprietor of the land had no such interest in the land. Lord Diplock delivering the judgment of the Privy Council at p. 45 of the report said:

> ... Under the Code interests in alienated land are divided into two categories: those which are registered and those which are not. The only interests capable of being registered are title, leases (including sublease) for a term exceeding three years, charges on the land and easements over the land. Registered title to land can be transferred and other registered interests in land can be created and transferred by registered dealings only.
>
> These dealings take effect when a written instrument in the appropriate form provided for by the Code is presented for registration at the Registry. The title to land or to an interest in the land which is conferred by registration is indefeasible in the absence of fraudulent or similar misconduct on the part of the person in whose name the title or interest is registered; but such misconduct does not defeat the registered title or interest of a *bona fide* purchaser for value from the guilty party or any person claiming through such a purchaser.

[59] Applying the provisions of NLC and the case law authorities cited above, we are of the view therefore that the SD sworn by Nik Ruhiah in favour of the defendant at best gave her an equitable right to occupy the land as a gratuitous licensee but did not confer any interest in land to the defendant that is capable of being recognised or registered under the NLC.

[60] We shall now turn to examine the position in law of the Syariah Court Order granting "ownership" of the house to the defendant. The said order reads as follows:

> Dengan sumpah yang di lafazkan baru sekejap oleh yang Menuntut maka Mahkamah hukum bahawa sebuah rumah 2 tingkat yang terletak diatas tanah lot no. 289 sekseyen 27 bandar Kota Bharu, Kelantan adalah kepunyaan dan hakmilik yang Menuntut Nik Salmah bt Hj Wan Zaid.

[61] It would appear from the judgment of the Syariah Appeal Court that the order was made by the Syariah Appeal Court pursuant to an application by the defendant under s. 9(2)(vii) of the Kelantan Administration of Syariah Court Enactment 1982

A No. 3/82 to confirm an oral wasiat made by her late adopted father to the effect that he intended to build a house on a piece of land known as Lot 150 for the defendant to stay on. However the father's wish could not be fulfilled before he passed away. The house was instead built on Lot 289 after her adopted father's
B death on instruction of her adopted mother, Nik Hasnah. Lot 289 was then registered in the name of Nik Ruhiah.

[62] Since the double-storey house on Lot 289 is not a chattel or movable property but a permanent structure on the land, what
C is the effect of the Syariah Court Order giving "ownership" of the house to the defendant in the light of the provisions of the NLC?

[63] In our view, in the light of the provisions of the NLC as discussed above and the decisions in, *inter alia*, *Teo Bee Ann* and *Registrar of Titles, Johore v. Temenggong Securities Ltd*, the Syariah
D Court Order is not a registrable interest that is capable of being registered under the NLC. Indeed, the caveat entered by the defendant in 2007 on the register document of title of Lot 289 purporting to protect her "interest" in the house pursuant to the SD and the Syariah Court Order was in fact wrongly entered
E because under s. 323 of the NLC a caveat can only be entered by a person claiming a registrable interest or title in any alienated land and not otherwise.

[64] In our view, neither can the Syariah Court Order confer a
F "title" to the house in the defendant that is capable of being recognised or registered under the NLC. The reason is this. Under the NLC, the word "land" is defined as including, *inter alia*, '(d) all things attached to the earth or permanently fastened to anything attached to the earth', commonly known as fixtures.
G Hence, when an alienated land is transferred and registered pursuant to s. 215(1) of the NLC in favour of a purchaser, the transfer in effect transfers the whole of that piece of land, including the surface of the earth and earth below the surface, all vegetation and other natural products and all permanent fixtures
H attached on the said land to him.

[65] In other words, in the light of the definition of "land" read with the legal effect of a transfer of land as provided in s. 215 together with the indefeasibility of that title under s. 340 of the
I NLC, the Syariah Court Order at best confers on the defendant an equitable or beneficial interest in the said bungalow house which is neither capable of being recognised nor registered under the NLC.

[66] In *Cahaya Ideal (M) Sdn Bhd*, Abdul Malik Ishak J quoting from the Privy Council case of *United Malayan Banking Corporation Bhd v. Pemungut Hasil Tanah, Kota Tinggi & Another Case* [1984] 2 CLJ 146; [1984] 1 CLJ (Rep) 51; [1984] 2 MLJ 87 held that the NLC does not recognise equity and s. 3(1) of the Civil Law Act 1956 cannot be relied on by the appellants for the importation of the English rules of equity as the provisions of the NLC was inconsistent with such rules. His Lordship quoted the Privy Council speaking through Lord Keith of Kinkel at p. 91 of the judgment as saying:

> The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.

[67] We agree with the view expressed in the aforementioned cases as stating the correct proposition of law under the NLC relating to the right or interest of an equitable or beneficial, *albeit* exclusive, gratuitous licensee under the NLC.

[68] What then is the right of a registered proprietor of land *vis-à-vis* an exclusive gratuitous licensee in terms of vacant possession of his land? In *Cahaya Ideal (M) Sdn Bhd*, Abdul Malik Ishak J held:

> Once the plaintiff proved its title and intention to regain possession, it was for the defendant to prove that she could set out a title or a right to possession inconsistent with the plaintiff's ownership. The burden is on the defendant to show that she had the right to occupy the land on a balance of probabilities.

[69] In *Toh Kheng Heng & Anor v. Ahmad Fauzi Mohd Taufek* [1994] 1 CLJ 547; [1994] 1 MLJ 356, the High Court took a similar view. In that case, the plaintiffs were the registered owners of a piece of land which they claimed that they had bought from the previous owner with vacant possession. The plaintiffs later entered into a sale and purchase agreement to sell the land and subsequently visited the land and discovered that the defendant and others were in occupation of it. The plaintiffs then issued a notice to quit on the defendant requiring him to give up vacant possession or to vacate the house he was occupying within two months from the date of notice. Despite the notice to quit, the

defendant failed to give up possession of the land. The plaintiffs therefore filed an application under O. 89 of the Rules of the High Court 1980 for an order that the plaintiffs be given possession of the land. The plaintiffs claimed that the defendant and the others were in occupation of the land without their consent, licence or agreement and also without the consent of the authorities and the plaintiffs claimed that the occupation of the land was unlawful. The defendant filed an affidavit in reply stating, *inter alia*, that the notice to quit served upon him was not valid under the law as he had an equitable right to occupy the land.

[70] In allowing the plaintiffs' application, the court held, *inter alia*, that the defendant himself did not seek to confer or claim any higher status as to his occupation of the land than as a licensee. He was therefore a gratuitous licensee and in that capacity, his licence to occupy the land was properly terminated when the notice to quit was served on him. Thereafter the defendant became a trespasser on the land and the plaintiffs were entitled to apply under O. 89 of the RHC for the defendant to quit the land. In the course of arriving at its decision, the court held as follows:

> Even if the defendant was allowed to occupy the land by the plaintiffs' predecessors-in-title and subsequently by the plaintiffs themselves, the defendant was only a gratuitous licensee and the consent of the plaintiffs' predecessors in-title or that of the plaintiffs to his occupation of the land did not have the effect of conferring upon him any rights in equity. He was a sojourner on the land at the will of the plaintiffs' predecessors-in-title and subsequently at the will of the plaintiffs. Upon the issue of the notice to quit on 24 November 1992 and its crystallization two months later, the defendant ceased having any right to remain on the land, his licence to occupy the land having been lawfully terminated.

(See also *Chuan Seng Sdn Bhd v. Ooi Boon Lai & Ors* [1993] 3 CLJ 153).

[71] Based on the above case law authorities, it is clear that as the registered proprietor of Lot 289 the plaintiff is entitled to require the defendant, a mere gratuitous licensee, to vacate the land by serving on her a proper notice to quit. In this case, the plaintiff had given a notice dated 14 May 2008 to the defendant to quit the land latest by 1 July 2008. On the expiry of the land the plaintiff was therefore entitled to the vacant possession of the land.

Third Issue: Is The Defendant A Tenant Coupled With An Equity?

Fourth Issue: If The Answer To Question (iii) Is In The Affirmative, Is The Plaintiff Nevertheless Bound By The Said Tenancy Such That He Cannot Ask The Defendant To Quit The Said Land Unless He Pays Her A Reasonable Compensation As Decided By The High Court Judge?

[72] We propose to deal with the third and fourth issues together. We shall first deal with the third issue whether the defendant is "a tenant coupled with equity" as was decided by the learned High Court Judge.

[73] In *Mok Deng Chee* the Federal Court through Salleh Abas, FCJ (as he then was) describes a tenant coupled with an equity as such:

> The law on tenancy coupled with an equity or simply an equitable estoppel arose from the speech of Lord Kingsdown in *Ramsden v. Dyson*, in which His Lordship referred to the principle as irrevocable licence. This principle was accepted and applied by the Privy Council in *Plimmer v. The City of Wellington*. Finally it received its judicial refinement in *Inwards v. Baker*. In this case Lord Denning M.R. defined the concept as follows:
>
> > It is quite plain from these authorities that, if the owner of land requests another or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has licence coupled with equity ... that the equity arising from the expectation of land does not fail ... The court can look at the circumstances and see whether there is any equity arising out of the expenditure of money.
>
> The principle is also known as equitable estoppel because the landowner whose conduct has raised an expectation of his tenant of being allowed to stay on and thereby inducing him to spend money in respect of the tenancy is prevented from taking any action contrary to that expectation.
>
> In the development of our law this principle was recognized as long ago as 1916 in the case of *M.P.R.L. Karuppan Chetty v. Suah Thian*. It was applied by Chang Min Tat J., as he then was, in *Devi v. Francis*. Finally it became a settled law as a result of decision of the Federal Court in *Yong Tong Hong v. Siew Soon Wah & Ors.*, which decision was subsequently confirmed by the Privy Council. Its practical application was demonstrated in the

A decision of Syed Othman J., whose judgment was confirmed by the Federal Court in *Tan Swee Hoe Company Limited v. Ali Hussain Bros.* and in the decision of Abdoolcader J. in *Wong Yon Lin v. Liew Tham Soon & Ors*.

B **[74]** In *Taufik a/l Hamid & Anor v. Bukit Makmur Sdn Bhd* [1995] 1 BLJ 68, Mohd Hishamudin Bin Mohd Yunus J (as he then was) held:

> This principle of equity as stated by Lord Kingsdown has been applied by our Courts in a number of subsequent cases. For
C example, in *Devi v. Francis* [1969] 2 MLJ 169 the High Court applied the principle in *Ramsden v. Dyson* to prevent the ground tenant from being evicted by the transferee of the land. The effect of the decision in *Devi v. Francis* is that such an expectation or promise created by the landlord is also binding on his successor-in-title and a purchaser with notice.

D **[75]** In *Majlis Perbandaran Pulau Pinang v. Syed Ahmed MM Gouse Mohamed* [2007] 1 CLJ 547, the Court of Appeal held:

> In a situation where the land belongs to one person and the
E building belongs to another, the law places this type of relationship in the category of a licence coupled with equity ...

[76] It is clear from the above cases that "a tenant coupled with equity" creates what one might call an equitable estoppel against the general rule that a person who spends money on improving
F the property of another has no right to claim reimbursement or any proprietary interest in the property (see *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19; [1993] 3 MLJ 352).

G **[77]** It has been held in a number of cases that a tenant coupled with an equity cannot be evicted with a bare notice to quit without his equity being satisfied (see *Sen Loon Heng lwn. Zabon & 3 Kes Lagi* [1996] 1 CLJ 775, *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1999] 6 CLJ 487 and *Majlis Perbandaran*
H *Pulau Pinang*).

[78] How or in what manner the equity of such a tenant is to be satisfied is dependent on the facts and circumstances of each case, but it is usually achieved or satisfied by the landlord compensating the tenant for the reasonable expenses incurred in
I improving the land (see *Sen Loon Heng* and *Majlis Perbandaran Pulau Pinang*).

[79] In *Sen Loon Heng*, Mohd Ghazali Mohd Yusoff J (as he then was) held:

> [1] Tenansi yang beserta dengan ekuiti tidak boleh ditamatkan dengan "a bare notice to quit". Ekuiti itu perlu dipuaskan dan tatacara bagaimana ekuiti itu boleh dipuaskan adalah tertakluk kepada fakta-fakta yang terdapat di dalam sesuatu kes.
>
> [2] Pemunya tanah boleh dibenarkan mendapat milikan kembali tanahnya dengan syarat ia membayar pampasan yang munasabah.

[80] Similarly in *Majlis Perbandaran Pulau Pinang*, the Court of Appeal held that in a situation where there is a tenancy coupled with an equity, the landowner may give notice to terminate the tenancy of the land but he cannot evict the tenant without satisfying the latter's equity and this is usually achieved by the payment of reasonable compensation.

[81] We must hasten to add at this juncture that in every case, whether a person is a tenant coupled with an equity is a question of fact to be gathered from the surrounding facts and circumstances of the case (See *Sen Loon Heng* and *Taufik a/l Hamid & Anor*).

[82] In *Mok Deng Chee*, Salleh Abas FCJ after describing who is a tenant coupled with equity, further held as follows:

> Reverting to the case under appeal we have to examine the circumstances in order to see whether the appellant had acquired a tenancy coupled with equity. The fact that there was no written agreement between the landowners and the house owners regarding the tenancy is immaterial. Payment of ground rent is a clear indication that the house owners had a tenancy of the portion of the land upon which the house was built. In the courts below a good deal of arguments were advanced as to whether the tenancy was yearly or monthly. For the purpose of equitable estoppels such arguments are of no consequence and completely irrelevant. The house was built by Hong Kong who rented the ground from the previous owner of the land. In the absence of any contrary evidence, we must assume that the house must have been built with encouragement and approval or at least without any objection by the previous landowner. Thus the expenditure involved in its construction raised in favour of Hong Kong an equity making him a tenant with an equitable estoppel. The tenancy together with its equity devolved on the appellant's father, when Hong Kong sold the house to him, and on his father's death the equity devolved on the appellant as a result of the

A transmission of the house to him. The house owner continued to enjoy their tenancy undisturbed right up to the time when the respondents became the owners of the land in 1969. The transfer of the land to the respondents made no difference to the tenancy and equity of the appellant. If at all, these were strengthened by the increase of the ground rent to $2.50 per month winch the appellant had to pay.

[83] It is clear from the decided cases above that the conditions to be satisfied before a person can be recognised as a tenant coupled with an equity are:

C

(i) There is usually a tenant-landlord relationship between him and the landowner;

(ii) He or his predecessor-in-title was a ground tenant and had been paying the ground rent regularly to the landowner or his predecessor-in-title (as was in the case of *Mok Deng Chee* and *Yeap Yok Tee* cited by the learned judge);

(iii) He or she on the encouragement or approval or at least without objection of the landowner had expended his or her own money in improving the land (in this case, in the construction of the double-storey bungalow house); and

(iv) The expenditure involved in the improvement of the land (in this case the construction of the bungalow house) raised an equity in favour of the tenant.

[84] In the light of the principles governing the position of a tenant coupled with an equity as enunciated by the various case law above, the next question to ask is whether, based on the totality of the evidence adduced before the court, the defendant can be described as a tenant coupled with an equity of Lot 289?

[85] Having perused the notes of proceedings and considered the submission of respective learned counsel, we would answer the question in the negative for the following reasons:

H

(a) There was no landlord-tenant relationship between the defendant and Nik Ruhiah as discussed earlier;

(b) the defendant had in her own pleading implied that she was an exclusive gratuitous licensee, and not a tenant, of Nik Ruhiah;

(c) the defendant had never paid a single sen in rental to Nik Ruhiah throughout her occupation of Lot 289 from 1985 to 2008;

(d) The defendant never pleaded that she had expended her own money to construct the bungalow house. What she had pleaded in her statement of defence and testified during examination in chief, was that pursuant to the SD she had obtained the approval of the local authority to construct the house. In fact, the defendant admitted during cross-examination that the money for the construction of the house came from her late adopted father as can be seen at p. 15 second last line of the record of appeal:

> Q: Pembinaan rumah itu adalah daripada duit arwah Hj Wan Mohd Zaid?
>
> A: Ya.

[86] We therefore agree entirely with learned counsel for the plaintiff that the learned judge had completely misapplied the law to the facts when he held that the defendant was (akin) to a tenant coupled with an equity of the said land.

[87] With regard to the fourth issue, it is our view that even if the defendant could be described as a tenant coupled with an equity, that equity was not to be met by the plaintiff. We note from the record of appeal that the plaintiff had testified that he had no notice of the defendant's alleged right through the SD or the Syariah Court Order when he entered into the SPA with Nik Ruhiah in 2005. It was only in 2007 when he wanted to register the transfer that he found out about the caveat of the defendant which was successfully removed by him before the transfer of the said land was effected. This fact was acknowledged by the learned judge at para. 14 at p. 7 of his judgment when he stated that "daripada keterangan tiada bukti yang menunjukkan bahawa NR telah memberitahu plaintiff tentang D9 iaitu kebenaran mereka kepada defendant dan tentang perintah mahkamah tinggi syariah bertarikh 11 April 2002". Whatever representation and or encouragement, if any, to the defendant to construct the said bungalow house was made by Nik Ruhiah. The defendant's recourse is therefore against Nik Ruhiah who has to satisfy her equity for any costs or expenses incurred in the construction of the bungalow house, if any.

[88] If we may also add that even if the defendant is to be recognised as a tenant coupled with an equity, her equity has long been met or satisfied by Nik Ruhiah who pursuant to the SD had allowed her to build the house and stay on the said land rent free for 22 years until 2008 when she was asked to quit by the plaintiff.

[89] We further note that the defendant in her pleading and testimony had claimed that she had been staying in the house since it was constructed in 1985 and has the right to remain on the said house and the said land. In our view, the idea of a gratuitous licensee being able to occupy an alienated land owned by someone else permanently or perpetually, after being given due notice to quit, is repugnant to the concept of indefeasibility of title of a registered proprietor as provided under s. 340 and the concept against adverse possession of land by occupation, as explicitly stated in s. 341 of the NLC, which reads as follows:

> Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the proprietor or any person or body entitled to an interest therein and accordingly the Limitation Act 1953 shall in no circumstances operate to extinguish any title to, or interest in, land.

The Issue Of Illegality Of The Plaintiff's Title

[90] In regard to the issue on illegality of the plaintiff's title, we wish to state at once that we find no merit in this issue. We agree entirely with learned counsel for the plaintiff that based on the pleadings of the parties and the nature of the plaintiff's claim against the defendant, this is not a case in which the title of the plaintiff is in issue. The plaintiff's case is a simple and straight forward case of a registered proprietor seeking vacant possession of his own land and mesne profit from a party for refusal to move after notice to quit has been given. It is also not the pleaded case of the defendant that the title to the land was obtained through fraud or misrepresentation perpetrated by the plaintiff or through an insufficient or void instrument. In fact in her pleading the defendant considered the plaintiff a victim of Nik Ruhiah whom she claimed had misrepresented to the plaintiff about the status of the said land and had even suggested that his remedy is against Nik Ruhiah, when that was not even the pleaded case of the plaintiff! Hence, the learned counsel for the defendant was

thoroughly misconceived when he raised the issue of illegality before the High Court and in this appeal before us when it is a non issue to begin with. Indeed, even if this issue is relevant, we are in entire agreement with the detailed submission of learned counsel for the plaintiff and the authorities cited by him therein (as outlined earlier in this judgment) that the plaintiff's title to Lot 289 was lawfully and legally obtained and is unimpeachable by virtue of s. 340 of the NLC.

[91] It was for all the above reasons that we allowed the appeal and set aside the order of the learned High Court Judge and grant judgment for the appellant in terms of prayer 11(a) of his statement of claim. We however refused prayer 11(b). We awarded costs of RM30,000 to the appellant and also ordered the deposit to be refunded.